Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01/05-01/13**
Date: **10/01/2014**

PRE-TRIAL CHAMBER II

Before: **Judge Cuno Tarfusser, Single Judge**

SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO,
AIMÉ KILOLO MUSAMBA,
JEAN-JACQUES MANGENDA KABONGO,
FIDÈLE BABALA WANDU & NARCISSE ARIDO

Confidential
with Confidential Annexes A & B

Defence request for financial assistance or, in the alternative, suspension of the proceedings against Jean-Pierre Bemba Gombo and withdrawal of Counsel

Source: **Defence for Mr. Jean-Pierre Bemba Gombo**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence
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States' Representatives

Amicus Curiae

REGISTRY

Registrar
Mr. Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

Counsel hereby requests that the learned Single Judge order the Registrar to loan monies to the Suspect to enable him to fund his defence or to suspend the current proceedings in so far as they relate to him. Failing the aforementioned, the Pre-Trial Chamber is requested to permit Counsel to withdraw from the case pursuant to Regulation 78(1) of the Regulations of the Court.

This application is filed confidentially because it refers to legal proceedings and submissions which are themselves currently classified as confidential.

Background

1. On 8 December 2013, the Suspect designated Counsel as his "*conseil pro bono…en attendant une decision au sujet de l'aide judiciaire*". Counsel accepted this designation after having expressly informed the Suspect that his agreement to work *pro bono* was to ensure that the latter would receive effective representation and advice until the Registrar had decided whether or not he was entitled to legal assistance. Counsel also informed the Suspect that his agreement to act *pro bono* related only to his professional fees and could not incorporate the costs and expenses necessary and/or incidental to the conduct of the case – such as carrying out investigative procedures or travelling to the seat of the Court. Counsel explained that prior to the first Prosecution disclosure (on 20 December 2013) and in the absence of any Court hearings he was fully able to provide an effective defence for the duration of the thirty days afforded to the Registrar to assess the Suspect's eligibility for legal assistance. The Suspect agreed to these terms and the Court registered Counsel's acceptance of the designation on 10 December 2013.

2. On 20 December 2013, the Registrar rejected the Suspect's request for financial legal assistance ("the Registrar's Decision").[1]

[1] Confidential Annex A.

3. On 30 December 2013, after attempting to broker a solution to the impasse with the Registry and after discussing matters with the Suspect, Counsel sent the Suspect a letter obliging him to find means of financing Counsel's fees and expenses failing which he would have to request to withdraw from the case. After further discussions with the Suspect during the holiday break, Counsel reached his own independent conclusion that the latter continues to be devoid of disposable means and, accordingly, suggested that he petition the Registrar requesting that funds be reallocated from case ICC-01/05-01/08. The Suspect agreed to such an option in the event that the present application for a loan or judicial review of the Registrar's Decision should fail.

4. On 30 December 2013, Counsel's letter[2] was transferred to the Suspect by the staff of the ICC detention facility as a one-off courtesy because Counsel lacks administrative support staff.

5. On 6 January 2014, Counsel petitioned the Presidency with an application for judicial review of the Registrar's Decision.

6. On 7 January 2014, Counsel wrote to the Counsel Support Services in the Registry ("CSS") asking whether it would be possible to reassign monies available in case ICC-01/05-01/08 to case ICC-01/05-01/13. Counsel suggested to CSS that it would be a convenient temporary solution and, moreover, economically considerate since it would not involve any extra financial outlay to the Court. Counsel further noted that, as of 20 December 2013, new staff had been appointed to the defence team in ICC-01/05-01/08 and salaries had been increased despite the fact that the case had reached the phase of closing submissions where no further investigations were necessary.

7. On 8 January 2014, Counsel discussed reallocation of funds with the Suspect's principal counsel on case ICC-01/05-01/08 who stated that he was not prepared to negotiate any reduction in the financial resources made available to him and his

[2] Confidential Annex B.

team. It should be stated that Counsel was not made aware of the hiring and salary developments in case ICC-01/05-01/08, learning about them merely from his perusal of the Court records system when they were made available on 8 January 2014 by virtue of the Registrar's "*Enregistrement d'une lettre de M. Jean-Pierre Bemba Gombo désignant librement son conseil et précisant la composition de l'équipe assurant sa defense*".[3] The annexes to this filing (containing the proposed salary distribution and the names of staff) are, apparently, confidential *ex parte* and Counsel does not have access to them.

8. On 8 January 2014, CSS replied to Counsel stating that it could not reallocate funds from Case ICC-01/05-01/08 to Case ICC-01/05-01/13 because there was no statutory support for such a proposal and because the decision forwarding monies in the former case was specific to that case alone. Counsel begged to differ and suggested that such reallocation could be facilitated with the agreement of the Suspect.

9. On 9 January 2014, Counsel petitioned the Prosecutor with a request that she agree to temporarily suspend the proceedings against the Suspect pending resolution of the issue of the funding of the Suspect's defence. Counsel expressed his view that no prejudice would be caused either to the Defence or to the Prosecution. The Defence would not be prejudiced because forcing the case to continue at the present moment in time and in the absence of funding would mean inability to investigate and counter the Prosecution evidence. The Prosecution would, likewise, not be prejudiced because one suspect – Narcisse Arido is yet to be surrendered to the Court and the Suspect remains in detention, denied provisional release in case ICC-01/05-01/08. There are, of course, no victim participants in a case prosecuted by virtue of article 70 of the Rome Statute. Counsel awaits the Prosecutor's response to this proposal.

[3] ICC-01/05-01/08-2927 & Conf Annexes

Submission

10. Having exhausted all avenues, Counsel now turns to the learned Single Judge as a last resort.

11. Counsel is aware that the learned Single Judge is also a member of the Presidency and is thus familiar with the arguments made in the application for judicial review. In the said application for judicial review, Counsel challenged the means whereby the Registrar calculated the Suspect's disposable means, the criteria that he employed and the allegedly unreasonable failure to conform to judicial precedent which had already provided a solution to the problem of the Suspect's lack of access to assets which may be realized to fund his defence.

12. The present request that the Court order the loan of monies to the client is *sui generis* and relies on the same principles enunciated in the fundamental decision delivered confidentially by Trial Chamber III on 20 October 2009 and in a public version on 26 November 2009.[4]

13. In that decision, Trial Chamber III found that the Suspect was not indigent and, apparently, a man of "considerable means". Trial Chamber III, nevertheless, considered the purported wealth of the Suspect to be irrelevant. The only issue deemed of relevance was "whether in the immediate future the accused will have sufficient means to pay for his legal assistance in order to prepare his defence to the charges…".[5] In the circumstances, Trial Chamber III found that the Suspect's inability to access and realize his alleged resources would deny him the opportunity to be tried without undue delay and to be afforded adequate facilities for the preparation of his defence. Moreover, Trial Chamber III stated, quite emphatically, that it was not "prepared to condone the possibility of a further period (of more than *de minimis* length) during which defence funding is unavailable and uncertain".[6] The solution ordered by Trial Chamber III was the monthly advance of the sum deemed

[4] ICC-01/05-01/08-567.
[5] *ibid* at paragraph 2.
[6] Ibid at paragraph 6.

appropriate by the Registrar for conducting a defence at the relevant stage of proceedings. That sum - 30,150 Euros per month (presently 32,922 Euros per month) was to be reimbursed at a later date, *inter alia*, through the use of legally enforceable documents issued in favour of the Registrar. In later decisions, Trial Chamber instituted a reporting mechanism binding both on former defence counsel and on the Registrar in order to supervise what efforts had been taken to reimburse the monies forwarded.

14. The rationale underpinning Trial Chamber III's decision was its understanding of article 67 of the Rome Statute which states quite clearly that an accused shall be afforded legal assistance if he "lacks sufficient means to pay for it". As Trial Chamber III emphatically stated: "This right is not dependent on an assessment of whether or not an accused may at some stage in the future have access to significant funds or whether in a general sense he is to be considered "wealthy"; it is, instead, focussed solely on whether or not the accused has sufficient means to pay for his legal assistance". It was also held that the term "means" connoted availability of resources "immediately or in the near future".[7] The Suspect's present financial circumstances are no different today than they were back in 2009. If anything, they have deteriorated given the depreciation in value of the real property identified in the Registrar's Decision and the outstanding debt owed to the Court arising out of case ICC-01/05-01/08.

15. It should be stressed that the Registrar's Decision while declaring that the Suspect is not indigent and thus ineligible for legal assistance, does not, in any way, challenge the working hypothesis identified by Trial Chamber III; namely that the Suspect is not capable of making available resources for an effective defence in the immediate or near future.

[7] Ibid at paragraph 103.

16. The learned Single Judge is therefore requested to find that the Suspect's financial situation remains unchanged and that he remains unable to make available resources in the immediate or near future. Accordingly, the Single Judge is respectfully requested to order the Registrar to apply the very same policy that was adopted in case ICC-01/05-01/08 and continues to be adopted to this day.

17. Counsel finds it necessary to stress that the nature of the charges presented by the Prosecution in the present case are of no relevance to the issue of whether the Suspect should receive monthly financial assistance for future reimbursement. Although the Suspect is charged with ordering the transfer of monies in order to corrupt or bribe witnesses, these charges are the very allegations which the Prosecution is duty bound to prove beyond reasonable doubt. The Suspect is innocent until proved guilty through due process of law and such due process will only be afforded him if he has the means to pay for an effective defence. Accordingly, at this stage of the legal process, the charges remain allegations and nothing more.

18. Counsel's agreement to represent the Suspect until the Registrar's Decision flowed from a sense of ethical obligation arising out his former active membership of the Suspect's defence team in case ICC-01/05-01/08. There was never any Prosecution allegation that Counsel was conflicted by this former role and it stands to reason that given his knowledge of case ICC-01/05-01/08, Counsel was and remains better positioned than other counsel to familiarize himself with the subject matter pertaining to case ICC-01/05-01/13. It is for this reason that the Suspect asked Counsel to assist him and not any other practitioner. Accordingly, and as Trial Chamber III correctly noted,[8] the right "to legal assistance of the accused's choosing" is statutorily protected yet cannot be guaranteed in the present circumstances.

19. Counsel has no desire whatsoever to abandon the Suspect as he struggles to mount a defence to case ICC-01/05-01/13 and he is fully aware of his duty under article 16(1) of the ICC Code of Professional Conduct to put the Suspect's interests

[8] ibid at paragraph 105.

first and foremost. Nevertheless, Counsel's representation of the Suspect was limited, as evidenced by the latter's written instruction, to that moment in time when the Registrar's Decision would be rendered. No counsel at the International Criminal Court has ever been required to represent a suspect *pro bono* against his will. Nor can Counsel be placed in a situation where he is forced to choose between bankrupting himself in order to finance the Suspect's defence out of his own pocket (something which is strictly forbidden to him under the rules of his own bar association)[9] or to disobey a court order requiring him to present himself at the seat of the Court when he is not capable of funding the travel expenses to do so. It would be unethical for Counsel to continue to defend the Suspect if Counsel felt that he lacked the financial means to facilitate an effective defence.

20. Counsel's request to withdraw pursuant to article 18(1)(b) of the Code of Professional Conduct is prompted by matters without his control. The Suspect cannot fulfil his present obligation to pay Counsel's professional fees and expenses or the cost of an investigation. Indeed, without such a budget, Counsel cannot present any form of effective defence. Equality of arms simply does not exist. Counsel is mindful of the duty to prevent prejudice to the Suspect yet even such a duty cannot oblige Counsel to act without the terms of his representation agreement and to his own personal detriment.

21. Notwithstanding the aforementioned, Counsel has proposed a solution which will neutralize any potential prejudice which could be caused by withdrawal. As mentioned above, Counsel suggested that the Prosecution consider suspension of the proceedings against the Suspect until such time as the necessary funding is supplied and for such time as the Suspect remains in detention in case ICC-01/05-01/08. Such an option is an equitable alternative to the more drastic measure of completely terminating the case because of total inability to protect the Suspect's fundamental rights under article 67 of the Rome Statute.

[9] Rule 44 of the Ethical Regulations of the Israel Bar Association.

22. On a final note, Counsel finds it appropriate to mention that he would quite happily continue to represent the Suspect, *pro bono*, until finality of all litigation pertaining to the issue of legal assistance but there is no guarantee that the Presidency or this honorable Chamber will render a decision on the matter in the immediate future. Indeed, it would be completely disrespectful on the part of Counsel to demand a time limit for a judicial decision. Of concern, however, to Counsel is the fact that until the issue of legal assistance is resolved, the learned Single Judge could decide to hold a hearing or require the performance of some other material act, which Counsel will not be able to perform unless he pays for it (as mentioned unfairly and unethically) out of his own pocket.

23. Counsel brings this matter to the attention of the Pre-Trial Chamber at the earliest notice because he does not wish that his continued participation in the present proceedings be understood as an implied agreement to act *pro-bono* beyond the terms of the mandate agreed between him and the Suspect.[10] Counsel will continue to file submissions with the Court in the interim only because he has not yet been released and is legally obliged to comply with Court orders.

<u>Relief Sought</u>

24. In light of all the aforementioned, the Single Judge is respectfully requested as follows:

1) To order the Registrar to forward the monthly sum of 32,922 Euros in order to finance the Suspect's defence at the pre-trial stage on condition that it be reimbursed at a later date;

[10] ICC-01/05-01/08-524 at paragraph 12 where HHJ Ekaterina Trendafilova intimated that continued representation could, in certain circumstances, constitute implied agreement to extend the limit of pro bono representation. This is not intended to be the situation in the present case.

2) To order that the advance of monies envisaged in sub-paragraph 1) above be effected retrospectively to 20 December 2013 being the date on which the Registrar's Decision was rendered and Counsel's *pro bono* mandate ceased;

3) Failing the aforementioned in sub-paragraphs 1) and 2) above, to immediately suspend proceedings in ICC-01/05-01/13 in so far as they relate to the Suspect pending resolution of the issue of legal assistance – whether it by way of judicial review of the Presidency or by way of reallocating funds in ICC-01/05-01/08 after seeking the views of Counsel for the Suspect in that case until such time as the Suspect should not be on remand in case ICC-01/05-01/08;

4) Failing the aforementioned in sub-paragraph 3) above, to immediately terminate the case against the Suspect entirely on the grounds that his basic rights under article 67 of the Rome Statute cannot, in any way, be protected.

5) Failing the aforementioned in sub-paragraph 4) above, to immediately allow Counsel to withdraw from the case pursuant to Regulation 78 of the Regulations of the Court.

6) To order that this filing and all Court records relating to the Suspect in case ICC-01/05-01/13 be transmitted to him in the ICC Detention Facility given that Counsel lacks the administrative means to effect such transmission.

Nicholas Kaufman

Nicholas Kaufman

Counsel for Jean-Pierre Bemba Gombo

Jerusalem, Israel
Friday, January 10, 2014